APPENDIX A

311 F.3d 1087

Fed. Sec. L. Rep. P 92,201, 16 Fla. L. Weekly Fed. C 13

United States Court of Appeals,
Eleventh Circuit.

Charles H. BEHLEN, individually and on behalf of a class of similarly situated persons and entities, Plaintiff-Appellant,

v.

MERRILL LYNCH, Phoenix Investment Partners, Ltd., Defendants-Appellees.

No. 01-16424.
Nov. 8, 2002.

[West headnotes and summary deleted]

[*1089] Albert L. Jordan, Michael L. Jackson, Wallace, Jordan, Ratliff & Brandt, L.L.C., Birmingham, AL, Joseph M. Druhan, Jr., Mobile, AL, M. Stephen Dampier, Montgomery, AL, Anthony M. Hoffman, Zieman, Speegle, Oldweiler & Jackson, L.L.C., Mobile, AL, for Plaintiff-Appellant.

Luther M. Dorr, Jr., A. Inge Selden, III, Maynard, Cooper, Frierson & Gale, Birmingham, AL, Kelly D. Reese, Mobile, AL, Julie Wilson, Maynard, Cooper & Gale, P.C., Montgomery, AL, D. Brent Baker, Frazer, Greene, Upchurch & Baker, P. Russel Myles, McDowell, Knight, Roedder & Sledge, LLC, Mobile, AL, for Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama.

Before WILSON, RONEY and ALARCON*, Circuit Judges.

WILSON, Circuit Judge:

Charles H. Behlen, individually and on behalf of a class of similarly situated individuals, appeals the district court's denial of his motion to remand his case to state court and its order dismissing his lawsuit. The district court determined that it had removal and supplemental jurisdiction over the action and therefore denied the motion to remand. The court further determined that the action was barred by the Securities Litigation Uniform Standards Act of 1998 (SLUSA), 15 U.S.C. §§ 77p, 78bb. Thus, the court dismissed Behlen's class-wide claims with prejudice and his individual claims without prejudice. Because we determine that the action was preempted by the SLUSA and subject to dismissal, we affirm.

BACKGROUND

From November 1999 to March 2000 Behlen purchased shares in a mutual fund known as the Phoenix-Engemann Aggressive Growth Fund. Behlen purchased the shares from Merrill Lynch & Co. and Phoenix Investment Partners, Ltd. (the defendants). On March 15, 2001, Behlen filed a civil action in state court seeking to recover money damages

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*Honorable Arthur L. Alarcon, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

resulting from his purchase of those shares. In his original complaint, which was styled as a class action, Behlen asserted various state law claims, including claims for breach of contract, breach of implied covenants and duties, breach of fiduciary duty, unjust enrichment, suppression, misrepresentation, and negligence and/or wantonness. He alleged that the defendants sold him and the class members Class B shares in the growth fund when they were unknowingly eligible to purchase Class A shares. He further alleged that the defendants sold them the wrong shares, because the Class B shares were subject to higher fees and commissions than the Class A shares.

On April 27, 2001, the defendants removed the lawsuit from state court to the United States District Court for the Southern District of Alabama, asserting that the district court had subject matter jurisdiction over the case pursuant to the SLUSA. Three days later, the defendants filed a motion to dismiss Behlen's complaint. Behlen subsequently filed an amended complaint, in which he asserted the same state law claims, deleted the claims for misrepresentation and suppression, and added claims for money had and **[*1090]** received and for an accounting. Behlen also removed all explicit references to any fraudulent activity by the defendants. He argued that the SLUSA was no longer applicable to his claims and filed a motion to remand the case to state court.

The district court ultimately denied Behlen's motion to remand and granted the defendants' motion to dismiss the action, dismissing the class-wide claims with prejudice and Behlen's individual claims without prejudice. This appeal followed.

STANDARD OF REVIEW

We review the denial of a motion to remand de novo. *Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207, 1211 (11th Cir. 1999). We also "review[ ] *de novo* the dismissal of a complaint pursuant to [Federal Rule of Civil Procedure] 12(b)(6)." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1187 (11th Cir. 2002).

DISCUSSION

I. Removal Jurisdiction

We first address whether the district court had removal jurisdiction over this action. Although Behlen asserted only state law claims in his original complaint, the defendants removed the case to the district court based upon their belief that Behlen actually alleged violations of federal securities laws, which fell within the scope of the SLUSA.

Generally, whether an action raises a federal question "is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L.Ed.2d 318 (1987). Thus, the plaintiff is "the master of the claim ... [and] may avoid federal jurisdiction by exclusive reliance on state law." *Id.* Furthermore, "a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Id.* at 393, 107 S. Ct. 2425.

The Supreme Court, however, has recognized "an 'independent corollary' to the well-pleaded complaint rule, known as the 'complete pre-emption' doctrine." *Id.* (citation omitted). The Court explained,

> On occasion, the Court has concluded that the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.

Id. (citation omitted) (internal quotation marks omitted).

Thus, whether a district court has removal jurisdiction over a state law case alleging securities fraud depends upon whether the claims fall within the scope of the SLUSA and are therefore preempted. In making this determination, it is helpful to consider the SLUSA and its historical context.

Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA), which established uniform standards for class actions alleging securities fraud. The procedural reforms enacted by the PSLRA were intended to prevent plaintiffs **[*1091]** from bringing "strike suits"[1] in

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[1] A strike suit is defined as "[a] suit . . . often based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement." *Black's Law Dictionary* 1448 (Bryan A. Garner ed., 7th ed.

securities matters. H.R. Conf. Rep. No. 105-803, at 13 (1998) (discussing the PSLRA). Congress found that the high costs of defending strike suits often forced defendants to settle meritless class actions. H.R. Conf. Rep. No. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 730. The PSLRA addressed this problem by instituting heightened pleading requirements for class actions alleging fraud in the sale or purchase of national securities.[2] *Riley v. Merrill Lynch,*

1999).

[2] Section 78u-4 provides in relevant part,

(1) Misleading statements and omissions

In any private action arising under this chapter in which the plaintiff alleges that the defendant--

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

. . . .

(3) Motion to dismiss; stay of discovery

(A) Dismissal for failure to meet pleading requirements

In any private action arising under this chapter, the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraphs

(continued...)

Pierce, Fenner & Smith, Inc., 292 F.3d 1334, 1340 (11th Cir.), *cert. denied*, 71 U.S.L.W. 3178 (U.S. Oct. 15, 2002) (No. 02-378). The PSLRA also required a mandatory stay of discovery until the district court could determine the legal sufficiency of the class action claims. *See* 15 U.S.C. § 78u-4(b)(3)(B).

By 1998, however, it became apparent to Congress that the objectives of the PSLRA were being frustrated, because plaintiffs were evading its heightened pleading requirements by bringing suit in state court rather than federal court. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 2(2)-(3), 112 Stat. 3227, 3227; *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 108 (2d Cir. 2001) (noting that "litigants were able to assert many of the same causes of action, but avoid the heightened procedural requirements instituted in federal court"). Congress thus resolved that in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the

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[2] (...continued)
(1) and (2) are not met.
(B) Stay of discovery
In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

15 U.S.C. § 78u-4(b)(1), (3).

appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

Pub. L. No. 105-353, § 2(5).

As a result, Congress passed the SLUSA, which amended the Securities Act of 1933 and the Securities Exchange Act of 1934 and made federal court, with limited exceptions, the sole venue for class actions alleging fraud in the purchase and sale of **[*1092]** covered securities.[3] *Riley,*

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[3] The SLUSA amended the 1933 Act to provide as follows:

> (b) Class action limitations
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging-
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.
>
> (c) Removal of covered class actions
>
> Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

(continued...)

292 F.3d at 1341. Congress further mandated that such class actions would be governed by federal law rather than state law. *See* H.R. Conf. Rep. No. 105-803, at 13. To that end, the SLUSA preempts certain state law claims, allows for removal of state actions to federal court, and requires immediate dismissal of "covered lawsuits." *Riley*, 292 F.3d at 1341.

A party seeking to remove an action to federal court pursuant to the SLUSA bears the burden of showing that "(1) the suit is a 'covered class action,' (2) the plaintiffs' claims are based on state law, (3) one or more 'covered securities' has been purchased or sold, and (4) the defendant misrepresented or omitted a material fact 'in connection with the purchase or sale of such security.' " *Id.* at 1342 (emphasis omitted). The district court found that each of these requirements had been met and that the action was therefore removable. Behlen, however, argues that the case was not removable, because the action was not a "covered class action" and the misconduct alleged in the complaint was not "in connection with" the sale or purchase of a security.

A. "Covered Class Action"

Behlen argues that his case was not removable, because it was not a "covered class action." Behlen points to the statutory language of the SLUSA, which provides that "[n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be *maintained* in any State or Federal court by any private party." 15 U.S.C.

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[3] (...continued)
15 U.S.C. § 77p(b)-(c). An identical amendment was made to the 1934 Act. *See id.* § 78bb(f)(1)-(2).

§§ 77p(b), 78bb(f)(1) (emphasis added). Behlen contends that at the time of removal the case was not maintained as a class action, because the state court had not determined whether the case should proceed in a class-wide fashion.

We find no merit in Behlen's argument and believe that it is based upon a misreading of the statute. The SLUSA does not require that an action be "maintained as a class action" before it can be removed; rather, it merely provides that no class action falling within the scope of its coverage can be maintained in a state or federal court, which means that dismissal of a "covered class action" is required. *Prager v. Knight/Trimark Group, Inc.*, 124 F. Supp. 2d 229, 231 (D. N.J.2000).

The SLUSA defines a "covered class action" as

> any single lawsuit in which . . . damages are sought on behalf of more than 50 persons or *prospective* class members, and questions of law or fact common to those persons or members of the *prospective* class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate **[*1093]** over any questions affecting only individual persons or members.

15 U.S.C. §§ 77p(f)(2)(A)(i)(I), 78bb(f)(5)(B)(i)(I) (emphasis added). We thus believe that it is clear from the statutory language that prospective class actions are removable to federal court even if the state court has not determined whether the action should go forward as a class action. Were we to find that a class action must be "maintained" as such *before* it is subject to removal under the SLUSA, we

essentially would require that the action be certified in state court before it could be removed to federal court. Nothing in the statutory language of the SLUSA, however, suggests that certification prior to removal is required. Indeed, requiring certification prior to removal would frustrate the objectives of the SLUSA rather than further them. The SLUSA's provisions "were designed to enable securities defendants to obtain early dismissal of frivolous class actions, and thereby avoid the high expense of discovery." *Riley*, 292 F.3d at 1341. Requiring certification prior to removal would entail potentially lengthy and expensive pretrial practice and discovery in state court, regardless of the merits of the action. We believe that such a prospect is contrary to the stated objectives of the SLUSA.

B. "In Connection with"

Behlen next argues that the district court's exercise of removal jurisdiction over his case was improper, because the misconduct alleged in the complaint did not occur "in connection with" the sale or purchase of securities.

The SLUSA does not define the phrase "in connection with the purchase or sale of a covered security." The Supreme Court has not had occasion to interpret this phrase in the context of the SLUSA, but has interpreted the identical phrase as it appears in Rule 10b-5, which implements section 10(b) of the 1934 Act.[4] *See Blue Chip*

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[4] Section 10(b) makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . ., any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." Securities Exchange Act of

(continued...)

Stamps v. Manor Drug Stores, 421 U.S. 723, 737-38, 95 S. Ct. 1917, 44 L.Ed.2d 539 (1975). Thus, in *Riley*, we looked to *Blue Chip* when we determined that Congress intended the phrase "in connection with" to have the same meaning under the SLUSA that it has under section 10b-5, because the SLUSA was enacted as an amendment to the 1933 and 1934 Acts. 292 F.3d at 1342-43; *see also Green v. Ameritrade, Inc.*, 279 F.3d 590, 597 (8th Cir. 2002).

In *Blue Chip*, the Supreme Court held that there is no cause of action under section 10b-5 unless a challenged misrepresentation or omission caused the plaintiff to buy or sell a particular stock. 421 U.S. at 748-49, 95 S. Ct. 1917. Based upon that holding, the Eighth Circuit held in *Green* that the SLUSA did not preempt a state law breach of contract claim where the plaintiff failed to allege that the defendants made misrepresentations that caused them to buy a covered security. 279 F.3d at 598-99. Green filed a breach of contract action in state court, alleging that he contracted with Ameritrade to receive "real time" stock quotes on Ameritrade's Web site, but the quotes listed on the site actually were not in real time. *Id.* at 593-94. The court found that Green did not allege in his amended complaint that the delayed quotes caused him to buy or **[*1094]** sell a covered security; rather, he merely alleged that he contracted for a service, but did not receive the kind of information for which he believed he was paying. *Id.* at 598-99.

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[4] (...continued)
1934 § 10(b), 15 U.S.C. § 78j(b). Rule 10b-5 prohibits the use of "any device, scheme, or artifice to defraud" or any other "act, practice, or course of business" that "operates . . . as a fraud or deceit." 17 C.F.R. § 240.10b-5.

In contrast to the plaintiff in *Green*, Behlen specifically alleged that the defendants "negligently, recklessly or intentionally misrepresented the fact that Plaintiff and the class would be sold Class A shares," but "sold to them more expensive Class B shares." Additionally, he alleged that the defendants "suppressed the true facts concerning the repeated sales to them of Class B Shares" and "concealed and suppressed the illegality of their conduct ... and continued to sell them Class B shares." It is clear that the crux of the complaint was that the defendants either misrepresented or omitted crucial facts about the Class A and Class B shares, thus causing him and the class to invest in inappropriate securities. Behlen argues, however, that these wrongful acts were not made "in connection with" the sale of securities, but merely were incidental to the sale of the securities.

We believe Behlen's claims are similar to the claims asserted by the plaintiffs in *Dudek v. Prudential Securities, Inc.*, 295 F.3d 875 (8th Cir. 2002). In that case, the plaintiffs filed a class action suit in state court alleging that the defendants improperly marketed tax-deferred annuities to accounts that already enjoyed tax-deferred status. *Id.* at 877. The plaintiffs argued that the annuities were inappropriate investments, "because tax-deferred accounts did not need the tax benefits, and therefore the extra fees and costs that tax-deferred annuities entail[ed] were a waste of the investors' money." *Id.* The plaintiffs acknowledged that the annuities at issue were "covered securities," but argued that their claims were not preempted by the SLUSA because they were based upon the defendants excessive fees rather than misconduct "in connection with" the sale of securities. *Id.* at 878. The Eighth Circuit rejected the plaintiffs' argument that they did not allege fraud, misrepresentation, or an omission of material fact; it agreed with the district

court that the gravamen of the plaintiffs' complaint "involve[d] an untrue statement or substantive omission of a material fact in connection with the purchase or sale of a covered security." *Id.* at 879 (internal quotation marks omitted).

In the instant case, although Behlen argues that the excess fees and commissions paid by the class members were incidental to the sale of the securities, it seems certain that the very reason they were sold the Class B shares was *because* those shares were subject to the excess fees and commissions. Thus, the fees and commissions were not incidental to the sale of the securities, but were an integral part of the transactions. To the extent that the defendants misrepresented which shares would be sold to the class, those misrepresentations were made "in connection with" the sale of the shares.[5]

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[5] In support of his argument, Behlen relies heavily upon *SEC v. Zandford*, 238 F.3d 559 (4th Cir. 2001), *rev'd*, 535 U.S. 813, 122 S. Ct. 1899, 153 L.Ed.2d 1 (2002). That decision was reversed, however, by a unanimous Supreme Court. *See Zandford*, 535 U.S. 813, 122 S. Ct. 1899, 153 L.Ed.2d 1. The Court noted that the SEC always has adopted a broad reading of the phrase "in connection with the purchase or sale of any security." *Id.* at 1903. The Court stated, "While the statute must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b), neither the SEC nor this Court has ever held that there must be a misrepresentation about the value of a particular security in order to run afoul of the Act." *Id.* (citation omitted). The Court went on to state that the securities sales and the broker's fraudulent acts were not independent events, but, in fact, coincided with each other because each sale was made to further the broker's

[*1095] Having determined that the action was a "covered class action" alleging misrepresentation "in connection with" the sale of covered securities, we conclude that the removal of the case pursuant to the SLUSA was proper. Furthermore, once the case was removed to the district court, the SLUSA required that it be dismissed.[6]

II. Remand

We now address whether the district court should have remanded the case to state court after Behlen amended his complaint. Behlen argues that even if the action was removable to district court, the court should have remanded the case back to state court after he amended his complaint. Behlen admits that he amended the complaint to delete all

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fraudulent scheme. *Id.* at 1904.

[6] Behlen further argues that the district court erred in dismissing the class-wide claims with prejudice. Behlen characterizes the district court's dismissal of the class-wide claims as a ruling that the class action could not be certified. The district court, however, did not determine whether Behlen satisfied the certification requirements of Federal Rule of Civil Procedure 23. The district court simply adhered to the text of §§ 77p and 78bb and determined that Behlen's class-wide claims were barred.

Because Behlen's case was a "covered class action" asserting state law claims that fell within the scope of the SLUSA, the district court had no choice but to dismiss the class-wide claims. Furthermore, the claims were subject to dismissal with prejudice, because Behlen could not recover on *any* state law claim alleging that he and the class were wrongfully induced to buy the Class B shares.

claims and allegations that might be deemed to fall within the scope of the SLUSA. Absent allegations of misrepresentation, he argues, the complaint no longer contained allegations of the kind of misconduct covered by federal securities laws. Behlen thus contends that the district court no longer had subject matter jurisdiction over the case and should have remanded the case to state court.

In *Poore v. American-Amicable Life Insurance Co. of Texas*, 218 F.3d 1287, 1290-91 (11th Cir. 2000), we joined our sister circuits in holding that if a district court has subject matter jurisdiction over a diversity action at the time of removal, subsequent acts do not divest the court of its jurisdiction over the action. Accordingly, we held that even though the plaintiffs amended their complaint to reduce the amount in controversy, the district court still retained diversity jurisdiction over the action and "committed reversible error by remanding based on Appellees' post-removal amended complaint." *Id.* at 1292.

In the instant case, the district court had federal question jurisdiction over Behlen's original complaint, because the claims therein were preempted by the SLUSA. Pursuant to 28 U.S.C. § 1367(a), the court also had supplemental jurisdiction over the remaining state law claims in the original complaint. The court had discretion to retain jurisdiction over the state law claims even after Behlen amended the complaint to remove any federal cause of action. *See Porsche Cars N. Am., Inc. v. Porsche.Net*, 302 F.3d 248, 256 (4th Cir. 2002); *Mauro v. S. New England Telecomms., Inc.*, 208 F.3d 384, 388 (2d Cir. 2000) (per curiam). Moreover, it was proper for the court to retain jurisdiction over Behlen's amended complaint, because, despite his removal of the allegations that would bring his

in March 1997 and again in September 1997 – for driving under the influence of alcohol, although he had not been convicted of either offense. E.T. admitted that he had continued to drive home on occasion after he had "had two or three beers at the Stadium Grill.... I mean, it's kind of hard to stop at Applebee's or wherever and not drive to get home whether you have one or twenty."

A representative of DHR testified that, although DHR's policy was to seek a relative for placement when an appropriate relative could be located, in the representative's five and one-half years of experience with DHR she had never known DHR to remove a child from a home after the child had been placed in the home as an infant and had remained in the home for three years.

A.M.A. is now five and one-half years old. Every witness testified that the child is a happy, loving child. The trial court, in its discretion, awarded custody of A.M.A. to S.P., who has had physical custody of the child since she was an infant and who has provided the only home, and in a real sense, has been the only mother, the child has ever known.

Because the lead opinion in *W.T.M. II* considered this case to involve a dependency proceeding, our mandate that the trial court apply a "best-interests" standard on remand was consistent with Ala. Code 1975, § 12-15-71(a). That statute provides, in pertinent part:

> "If a child is found to be dependent, the court may make any of the following orders of disposition *to protect the welfare of the child:*

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

JAN 13 2003

THOMAS K. KAHN
CLERK

No. 01-16424-DD

CHARLES H. BEHLEN,
individually and on behalf of a
class of similarly situated persons
and entities,

Plaintiff-Appellant,

versus

MERRILL LYNCH,
PHOENIX INVESTMENT PARTNERS, LTD.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: WILSON, RONEY and ALARCON*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

*Honorable Arthur L. Alarcon, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILE COPY

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CHARLES H. BEHLEN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION 01-0298-M
	:	
MERRILL LYNCH & CO., INC., et al.,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION AND ORDER

This action comes before the Court on Defendants' Motion to Dismiss (Docs. 2-3), Plaintiff's Motion to Remand (Doc. 15), Defendants' Motion to Dismiss Plaintiff's First Amended Complaint (Docs. 16-17), Defendants' Brief Opposing Plaintiff's Motion to Remand (Doc. 21), Plaintiff's Response to Defendants' Motion to Dismiss (Doc. 22), Plaintiff's Reply to Defendants' Brief regarding Remand (Doc. 25), and Defendants' Reply Brief Regarding Dismissal (Doc. 26). Jurisdiction has been invoked in this Court under The Securities Litigation Uniform Standards Act of 1998

(hereinafter SLUSA). 15 U.S.C. §§ 77p, 78bb(f). The parties consented in writing to have all matters and proceedings in this action conducted by the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(c) (see Doc. 14). After consideration, Defendants' Motion to Dismiss is GRANTED and this action is DISMISSED.

The facts of this action, briefly, are as follows. Beginning on November 5, 1999, Plaintiff Charles H. Behlen purchased shares in the Phoenix-Engemann Aggressive Growth Fund, and from other affiliated Phoenix funds from Defendants Merrill Lynch & Co, Inc and Phoenix Investment Partners, Ltd. (Doc. I, Complaint ¶¶ 1, 11).[1] On March 15, 2001, Behlen brought a civil action in the Mobile County Circuit Court to recover monetary damages which accrued from the purchase of those Growth Fund shares (Doc. 1, ¶ 1). Plaintiff raised seven claims in that complaint: breach of contract, breach of implied covenants and duties, breach of fiduciary duty, unjust enrichment, suppression, misrepresentation, and negligence and/or wantonness; Behlen's action is styled as a class action complaint (Doc. 1, Complaint). On April 27, 2001, Defendants removed the action to this Court, asserting SLUSA jurisdiction (Doc. 1). Plaintiff subsequently filed an amended complaint (Doc. 9). Defendants now seek to have this action dismissed while Plaintiff would have the action remanded back to the state court.

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[1] The Court will refer to Merrill Lynch and Phoenix Investment Partners, Ltd. collectively as Defendants.

The Court first needs to determine whether it properly has jurisdiction over this matter. In its removal petition, Defendant alleges jurisdiction under 15 U.S.C. §§ 77p,

78bb(f) and that this action is removable pursuant to 28 U.S.C. § 1441(b) (Doc. 1). In a removal action, the party asserting jurisdiction has the burden of establishing proof of it by a preponderance of the evidence. *McNutt v. General Motors Acceptance Co. of Indiana, Inc.*, 298 U.S. 178 (1936). In a removal action, that burden is upon the defendant. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921). Removal is a statutory remedy which must be narrowly construed so as to limit federal jurisdiction. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Robinson v. Quality Ins. Co.*, 633 F. Supp. 572 (S.D. Ala. 1986).

Before the jurisdictional issue can be settled, the Court must determine which complaint to examine. Behlen asserts that the Court should look at the amended complaint while Defendants argue that the original complaint is the appropriate pleading to consider. The Eleventh Circuit Court of Appeals has held that "the district court must determine whether it had subject matter jurisdiction at the time of removal." *Poore v. American-Amicable Life Ins. Co. of Texas*, 218 F.3d 1287, 1290-91 (11th Cir. 2000). The *Poore* Court went on to say that events occurring after removal . . . do not oust the district court's jurisdiction." *Poore*, 218 F.3d at 1291; *see also St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 287 (1938). On the basis of *Poore*, the Court will examine the original complaint to determine if jurisdiction existed at the time of removal.

The Court notes, summarily, that Congress, in 1995, passed the Private Securities Litigation Reform Act as a means of limiting a plaintiff's ability to bring class action securities lawsuits. To bypass the new restrictions, plaintiffs began filing securities actions in state courts. In 1998, Congress passed SLUSA to prevent this practice.

Under SLUSA,

> [n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase of sale of a covered security.

15 U.S.C. § 77p(b). Any state action which meets these criteria shall be removed "to the Federal district court for the district in which the action is pending." 15 U.S.C. § 77p(c). Defendants removed this action to this Court, citing these statutes.

To determine if this Court enjoys jurisdiction over this matter, it will be necessary to examine § 77p(b) more closely. The term covered class action has been defined to include a single lawsuit "in which damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class . . . predominate over any "questions affecting only individual persons or members." 15 U.S.C. § 77p(f) (2) (A) (i) (I). In the complaint, Behlen alleges that "the class exceeds several thousand members" (Doc. 1, Complaint, ¶ 19) . The complaint further states that "[t]here are questions of law

and fact common to members of the class which have resulted in a common pattern of damage sustained. These questions of law and fact predominate over any questions affecting individual class members." *Id.* at ¶ 22. Plaintiff seeks both compensatory and punitive damages. *Id.* at p. 9, ¶ c. The Court finds that this action is a covered class action.

The definition of covered security includes "a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940." 15 U.S.C. § 77r(b) (2); see also 15 U.S.C. § 77p(f) (3). Defendants assert that "[t]he Funds are, of course, registered under the Investment Company Act of 1940, and the Class B shares purchased by Plaintiff and the class were issued by the Funds" (Doc. 1, ¶ 12). Though the Court has found no evidence in the record to support the assertion, Behlen has not challenged it. The Court finds that the securities which are the subject of this action fall within the definition of covered securities.

The Court now must make a determination as to whether the remainder of § 77p(b) is satisfied. This requires an assertion of "an untrue statement or omission of a material fact" or that Defendants "used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b) (1, 2).

In bringing this action, Behlen, in the opening paragraphs of the complaint, makes the following assertions:

> 1. This is a class action brought by Plaintiff Charles H. Behlen "Behlen") on

behalf of a class composed of all individuals and entities who were wrongfully sold and charged excessive commission on Class B shares in the Phoenix-Engemann Aggressive Growth Fund ("Growth Fund") and other "affiliated Phoenix funds," by Merrill Lynch & Co., Inc. and Phoenix Investments Partners, Ltd., along with other possible unknown parties, when they were eligible for reduced sales charges of commissions from the purchase of Class A shares in the same.

2. Defendants wrongfully sold to Plaintiff and the class Class B shares in the Growth Funds and other "affiliated Phoenix funds" when they should have sold to Plaintiff and the class Class A shares at reduced sales charges and commissions. The Defendants knew or should have known that Plaintiff and the class were eligible to purchase Class A shares for reduced sales charges and commissions, but deliberately sold to Plaintiff and the class the Class B shares so as to wrongfully charge higher commissions for such transactions.

3. Recognizing that they should have sold to Plaintiff and the class members Class A shares and not Class B shares, the Defendants concealed and suppressed the illegality of their conduct from the Plaintiff and the class and continued to sell them Class B shares at higher commissions and charges.

> 4. Defendants' wrongful and unconscionable conduct constitutes a pattern and practice of intentional, willful, wanton, reckless, negligent and/or grossly negligent conduct.

Doc. 1, Complaint. This language, which provides clear evidence of Behlen's assertion of Defendants' misfeasance, would appear to satisfy the requirement of § 77p (b).

Plaintiff asserts, though, that Defendants have not proven that the transactions were "in connection with" the purchase or sale of the underlying securities. More specifically, Behlen argues that he is not challenging the securities; rather, his problem is "with the overcharging of sales commissions and fees" (Doc. 22, p. 26). Plaintiff asserts that his purchase of approximately $500,000 worth of shares was split into three separate purchases, rather than one large purchase, which resulted in higher commissions and fees charged to him (Doc. 22, p. 4). Additionally, Behlen has asserted that because of the large volume of shares that he was purchasing, he should have been acquiring Class A shares rather than the Class B shares which he actually purchased (*id.* at p. 5). Plaintiff maintains that these additional commissions and fees, for which she has brought this action, do not fall within the "in connection with" language of SLUSA.

Plaintiff has pointed to several cases as support for his argument. *See, e.g., Green v. Ameritrade, Inc.*, 120 F. Supp. 2d 795 (D. Neb. 2000) (SLUSA did not preempt subscribers' state law claims against internet securities information service's failure to provide "real time" market quotes as promised); *Abada v. Charles Schwab & Co., Inc.*, 127 F. Supp. 2d 1101 (S.D. Cal. 2000) (SLUSA did not preempt investors'

claim that stockbroker failed to deliver on assertion of immediate online trade transactions); *Shaw v. Charles Schwab & Co., Inc.*, 128 F. Supp. 2d 1270 (C.D. Cal. 2001) (SLUSA did not preempt claim that stock broker's promise resulted in selection of that broker, as opposed to other brokers, as claim did not concern selection of particular securities). The Court does not, however, find these cases instructive because the plaintiffs are not claiming that they got the wrong securities; while their lawsuits revolved around the purchase of securities, the securities themselves were only tangentially related to the actual claim.

In this action, the heart of Plaintiff's claim is that he did not get the shares that he now believes that he should have received. Behlen repeatedly states that he should have been purchasing Class A shares rather than the Class B shares because he could have acquired them and paid less money for fees and commissions.

The Court finds that Defendants have satisfied their burden of establishing that this Court has jurisdiction over this action pursuant to SLUSA. Accordingly, Plaintiff's Motion to Remand is DENIED (Doc. 15).

Defendants have also sought to have this action dismissed. The Court notes that Plaintiff has not provided any indication that he wishes to continue with this action in the event that this Court determines that it is governed by SLUSA. Because Behlen has not indicated a preference of pursuing his own individual claims in either the state or federal courts, this Court will assume that he would prefer the state court as that was where the action was originally filed.

Having reached the determination that this action falls within the language of SLUSA, and finding that SLUSA requires such action, the Court GRANTS Defendant's Motion to Dismiss (Doc. 2). This action is DISMISSED WITH PREJUDICE as to the class action claims and DISMISSED WITHOUT PREJUDICE as to Behlen's individual claims.

DONE this 27th day of August, 2001.

s/ Bert W. Milling, Jr.
BERT W. MILLING, JR.
UNITED STATES MAGISTRATE JUDGE

JUDGMENT ENTERED
ON DOCKET
Date 8/31/01 s/ [illegible initials]
CHARLES R. DIARD, JR. CLERK

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED THIS THE
27TH DAY OF AUGUST,
2001. JUDGMENT ENTRY ____
NO. 10034-D
CHARLES R. DIARD, JR., CLERK
BY s/ Cynthia [illegible]
DEPUTY CLERK

APPENDIX D

Public Law 105-353
105th Congress

An Act

To amend the Securities Act of 1933 and the Securities Exchange Act of 1934 to limit the conduct of securities class actions under State law, and for other purposes. [Nov. 3, 1998 [S. 1260]]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE. [Securities Litigation Uniform Standards Act of 1998. 15 USC 78a note.]

This Act may be cited as the "Securities Litigation Uniform Standards Act of 1998".

SEC. 2. FINDINGS. [15 USC 78a note.]

The Congress finds that –

(1) the Private Securities Litigation Reform Act of 1995 sought to prevent abuses in private securities fraud lawsuits;

(2) since enactment of that legislation, considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts;

(3) this shift has prevented that Act from fully achieving its objectives;

(4) State securities regulation is of continuing importance, together with Federal regulation of securities, to protect investors and promote strong financial markets; and

(5) in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

TITLE I—SECURITIES LITIGATION UNIFORM STANDARDS

SEC. 101. LIMITATION ON REMEDIES.

(a) AMENDMENTS TO THE SECURITIES ACT OF 1933.—

(1) AMENDMENT.—Section 16 of the Securities Act of 1933 (15 U.S.C. 77p) is amended to read as follows:

"SEC. 16. ADDITIONAL REMEDIES; LIMITATION ON REMEDIES.

"(a) REMEDIES ADDITIONAL.—Except as provided in subsection (b), the rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

"(b) CLASS ACTION LIMITATIONS. —No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

"(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

"(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

"(c) REMOVAL OF COVERED CLASS ACTIONS. —Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

"(d) PRESERVATION OF CERTAIN ACTIONS.—

"(1) ACTIONS UNDER STATE LAW OF STATE OF INCORPORATION. —

"(A) ACTIONS PRESERVED. —Notwithstanding subsection (b) or (c), a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

"(B) PERMISSIBLE ACTIONS. —A covered class action is described in this subparagraph if it involves—

"(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

"(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that—

"(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

"(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

"(2) STATE ACTIONS.—

"(A) IN GENERAL. —Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

"(B) STATE PENSION PLAN DEFINED. —For purposes of this paragraph, the term 'State pension plan' means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

"(3) ACTIONS UNDER CONTRACTUAL AGREEMENTS BETWEEN ISSUERS AND INDENTURE TRUSTEES. —Notwithstanding subsection (b) or (c), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee

may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

"(4) REMAND OF REMOVED ACTIONS. —In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

"(e) PRESERVATION OF STATE JURISDICTION. —The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

"(f) DEFINITIONS. —For purposes of this section, the following definitions shall apply:

"(1) AFFILIATE OF THE ISSUER. —The term 'affiliate of the issuer' means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

"(2) COVERED CLASS ACTION. —

"(A) IN GENERAL. —The term 'covered class action' means —

"(i) any single lawsuit in which —

"(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

"(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

"(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

"(I) damages are sought on behalf of more than 50 persons; and

"(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

"(B) EXCEPTION FOR DERIVATIVE ACTIONS. –Notwithstanding subparagraph (A), the term 'covered class action' does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

"(C) COUNTING OF CERTAIN CLASS MEMBERS. –For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

"(D) RULE OF CONSTRUCTION. – Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

"(3) COVERED SECURITY. –The term 'covered security' means a security that satisfies the standards for

a covered security specified in paragraph (1) or (2) of section 18(b) at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this title pursuant to rules issued by the Commission under section 4(2).".

(2) CIRCUMVENTION OF STAY OF DISCOVERY. – Section 27(b) of the Securities Act of 1933 (15 U.S.C. 77z-1(b)) is amended by inserting after paragraph (3) the following new paragraph:

"(4) CIRCUMVENTION OF STAY OF DISCOVERY. – Upon a proper showing, a court may stay discovery proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this subsection.".

(3) CONFORMING AMENDMENTS. – Section 22(a) of the Securities Act of 1933 (15 U.S.C. 77v (a)) is amended –

(A) by inserting "except as provided in section 16 with respect to covered class actions," after "Territorial courts,"; and

(B) by striking "No case" and inserting "Except as provided in section 16(c), no case".

(b) AMENDMENTS TO THE SECURITIES EXCHANGE ACT OF 1934. –

(1) AMENDMENT. – Section 28 of the Securities Exchange Act of 1934 (15 U.S.C. 78bb) is amended –

(A) in subsection (a), by striking "The rights and remedies" and inserting "Except as provided in subsection (f), the rights and remedies"; and

(B) by adding at the end the following new subsection:

"(f) LIMITATIONS ON REMEDIES. –

"(1) CLASS ACTION LIMITATIONS. –No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

"(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

"(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

"(2) REMOVAL OF COVERED CLASS ACTIONS. –Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

"(3) PRESERVATION OF CERTAIN ACTIONS. –

"(A) ACTIONS UNDER STATE LAW OF STATE OF INCORPORATION. –

"(i) ACTIONS PRESERVED. –Notwithstanding paragraph (1) or (2), a covered class action described in clause (ii) of this subparagraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

"(ii) PERMISSIBLE ACTIONS. –A covered class action is described in this clause if it involves –

"(I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively

from or to holders of equity securities of the issuer; or

"(II) any recommendation, position, or other communication with respect to the sale of securities of an issuer that –

"(aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

"(bb) concerns decisions of such equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

"(B) STATE ACTIONS. –

"(i) IN GENERAL. – Notwithstanding any other provision of this subsection, nothing in this subsection may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

"(ii) STATE PENSION PLAN DEFINED. – For purposes of this subparagraph, the term 'State pension plan' means a pension plan established and maintained for its employees by the government of a State or political subdivision thereof, or by any agency or instrumentality thereof.

"(C) ACTIONS UNDER CONTRACTUAL AGREEMENTS BETWEEN ISSUERS AND INDENTURE TRUSTEES. – Notwithstanding paragraph (1) or (2), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State

or Federal court by a party to the agreement or a successor to such party.

"(D) REMAND OF REMOVED ACTIONS. – In an action that has been removed from a State court pursuant to paragraph (2), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

"(4) PRESERVATION OF STATE JURISDICTION. – The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

"(5) DEFINITIONS. [Applicability.] – For purposes of this subsection, the following definitions shall apply:

"(A) AFFILIATE OF THE ISSUER. – The term 'affiliate of the issuer' means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

"(B) COVERED CLASS ACTION. – The term 'covered class action' means –

"(i) any single lawsuit in which –

"(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

"(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact

common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

"(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

"(I) damages are sought on behalf of more than 50 persons; and

"(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

"(C) EXCEPTION FOR DERIVATIVE ACTIONS. –Notwithstanding subparagraph (B), the term 'covered class action' does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

"(D) COUNTING OF CERTAIN CLASS MEMBERS. –For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

"(E) COVERED SECURITY. –The term 'covered security' means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933, at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under the Securities Act of 1933 pursuant to rules issued by the Commission under section 4(2) of that Act.

"(F) RULE OF CONSTRUCTION. – Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.".

(2) CIRCUMVENTION OF STAY OF DISCOVERY. – Section 21D(b)(3) of the Securities Exchange Act of 1934 (15 U.S.C. 78u-4(b)(3)) is amended by adding at the end the following new subparagraph:

"(D) CIRCUMVENTION OF STAY OF DISCOVERY. – Upon a proper showing, a court may stay discovery proceedings in any private action in a State court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph.".

(c) APPLICABILITY. [15 USC 77p note.] – The amendments made by this section shall not affect or apply to any action commenced before and pending on the date of enactment of this Act.

SEC. 102. PROMOTION OF RECIPROCAL SUBPOENA ENFORCEMENT. [15 USC 78u note.]

(a) COMMISSION ACTION. – The Securities and Exchange Commission, in consultation with State securities commissions (or any agencies or offices performing like functions), shall seek to encourage the adoption of State laws providing for reciprocal enforcement by State securities commissions of subpoenas issued by another State securities commission seeking to compel persons to attend, testify in, or produce documents or records in connection with an action or investigation by a State securities commission of an alleged violation of State securities laws.

(b) REPORT. [Deadline] – Not later than 24 months after the date of enactment of this Act, the Securities and Exchange Commission (hereafter in this section referred to as the "Commission") shall submit a report to the Congress –

(1) identifying the States that have adopted laws described in subsection (a);

(2) describing the actions undertaken by the Commission and State securities commissions to promote the adoption of such laws; and

(3) identifying any further actions that the Commission recommends for such purposes.

TITLE II – REAUTHORIZATION OF THE SECURITIES AND EXCHANGE COMMISSION SEC. 201. AUTHORIZATION OF APPROPRIATIONS.

Section 35 of the Securities Exchange Act of 1934 (15 U.S.C. 78kk) is amended to read as follows:

"SEC. 35. AUTHORIZATION OF APPROPRIATIONS.

"(a) IN GENERAL. – In addition to any other funds authorized to be appropriated to the Commission, there are authorized to be appropriated to carry out the functions, powers, and duties of the Commission, $351,280,000 for fiscal year 1999.

"(b) MISCELLANEOUS EXPENSES. – Funds appropriated pursuant to this section are authorized to be expended –

"(1) not to exceed $3,000 per fiscal year, for official reception and representation expenses;

"(2) not to exceed $10,000 per fiscal year, for funding a permanent secretariat for the International Organization of Securities Commissions; and

"(3) not to exceed $100,000 per fiscal year, for expenses for consultations and meetings hosted by the Commission with foreign governmental and other regulatory officials, members of their delegations, appropriate representatives, and staff to exchange views concerning developments relating to securities matters, for development and implementation of cooperation agreements concerning securities matters, and provision of technical assistance for the development of foreign securities markets, such expenses to include necessary logistic and administrative expenses and the expenses of Commission staff and foreign invitees in attendance at such consultations and meetings, including –

"(A) such incidental expenses as meals taken in the course of such attendance;

"(B) any travel or transportation to or from such meetings; and

"(C) any other related lodging or subsistence.".

SEC. 202. REQUIREMENTS FOR THE EDGAR SYSTEM.

Section 35A of the Securities Exchange Act of 1934 (15 U.S.C. 78ll) is amended –

(1) by striking subsections (a), (b), (c), and (e); and

(2) in subsection (d) –

(A) by striking "(d)";

(B) in paragraph (2), by striking "; and" at the end and inserting a period; and

(C) by striking paragraph (3).

SEC. 203. COMMISSION PROFESSIONAL ECONOMISTS.

Section 4(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78d(b)) is amended –

(1) by redesignating paragraph (2) as paragraph (3); and

(2) by inserting after paragraph (1) the following:

"(2) ECONOMISTS. –

"(A) COMMISSION AUTHORITY. – Notwithstanding the provisions of chapter 51 of title 5, United States Code, the Commission is authorized –

"(i) to establish its own criteria for the selection of such professional economists as the Commission deems necessary to carry out the work of the Commission;

"(ii) to appoint directly such professional economists as the Commission deems qualified; and

"(iii) to fix and adjust the compensation of any professional economist appointed under this paragraph, without regard to the provisions of chapter 54 of title 5, United States Code, or subchapters II, III, or VIII of chapter 53, of title 5, United States Code.

"(B) LIMITATION ON COMPENSATION. – No base compensation fixed for an economist under this paragraph may exceed the pay for Level IV of the Executive Schedule, and no payments to an economist appointed under this paragraph shall exceed the limitation on certain payments in section 5307 of title 5, United States Code.

"(C) OTHER BENEFITS. – All professional economists appointed under this paragraph shall remain within the

existing civil service system with respect to employee benefits.".

TITLE III—CLERICAL AND TECHNICAL AMENDMENTS

SEC. 301. CLERICAL AND TECHNICAL AMENDMENTS.

(a) SECURITIES ACT OF 1933.—The Securities Act of 1933 (15 U.S.C. 77 et seq.) is amended as follows:

(1) Section 2(a)(15)(i) (15 U.S.C. 77b(a)(15)(i)) is amended —

(A) by striking "3(a)(2) of the Act" and inserting "3(a)(2)"; and

(B) by striking "section 2(13) of the Act" and inserting "paragraph (13) of this subsection".

(2) Section 11(f)(2)(A) (15 U.S.C. 77k(f)(2)(A)) is amended by striking "section 38" and inserting "section 21D(f)".

(3) Section 13 (15 U.S.C. 77m) is amended —

(A) by striking "section 12(2)" each place it appears and inserting "section 12(a)(2)"; and

(B) by striking "section 12(1)" each place it appears and inserting "section 12(a)(1)".

(4) Section 18 (15 U.S.C. 77r) is amended —

(A) in subsection (b)(1)(A), by inserting ", or authorized for listing," after "Exchange, or listed";

(B) in subsection (c)(2)(B)(i), by striking "Capital Markets Efficiency Act of 1996" and inserting "National Securities Markets Improvement Act of 1996";

(C) in subsection (c)(2)(C)(i), by striking "Market" and inserting "Markets";

(D) in subsection (d)(1)(A) —

(i) by striking "section 2(10)" and inserting "section 2(a)(10)"; and

(ii) by striking "subparagraphs (A) and (B)" and inserting "subparagraphs (a) and (b)";

(E) in subsection (d)(2), by striking "Securities Amendments Act of 1996" and inserting "National Securities Markets Improvement Act of 1996"; and

(F) in subsection (d)(4), by striking "For purposes of this paragraph, the" and inserting "The".

(5) Sections 27, 27A, and 28 (15 U.S.C. 77z-1, 77z-2, 77z-3) are transferred to appear after section 26, in that order.

(6) Paragraph (28) of schedule A of such Act (15 U.S.C. 77aa(28)) is amended by striking "identic" and inserting "identical".

(b) SECURITIES EXCHANGE ACT OF 1934. —The Securities Exchange Act of 1934 (15 U.S.C. 78 et seq.) is amended as follows:

(1) Section 3(a)(10) (15 U.S.C. 78c(a)(10)) is amended by striking "deposit, for" and inserting "deposit for".

(2) Section 3(a)(12)(A)(vi) (15 U.S.C. 78c(a)(12)(A)(vi)) is amended by moving the margin 2 em spaces to the left.

(3) Section 3(a)(22)(A) (15 U.S.C. 78c(a)(22)(A)) is amended —

(A) by striking "section 3(h)" and inserting "section 3"; and

(B) by striking "section 3(t)" and inserting "section 3".

(4) Section 3(a)(39)(B)(i) (15 U.S.C. 78c(a)(39)(B)(i)) is amended by striking "an order to the Commission" and inserting "an order of the Commission".

(5) The following sections are each amended by striking "Federal Reserve Board" and inserting "Board of Governors of the Federal Reserve System": subsections

(a) and (b) of section 7 (15 U.S.C. 78g (a), (b)); section 17(g) (15 U.S.C. 78q(g)); and section 26 (15 U.S.C. 78z).

(6) The heading of subsection (d) of section 7 (15 U.S.C. 78g(d)) is amended by striking "EXCEPTION" and inserting "EXCEPTIONS".

(7) Section 14(g)(4) (15 U.S.C. 78n(g)(4)) is amended by striking "consolidation sale," and inserting "consolidation, sale,".

(8) Section 15 (15 U.S.C. 78o) is amended –

(A) in subsection (c)(8), by moving the margin 2 em spaces to the left;

(B) in subsection (h)(2), by striking "affecting" and inserting "effecting";

(C) in subsection (h)(3)(A)(i)(II)(bb), by inserting "or" after the semicolon;

(D) in subsection (h)(3)(A)(ii)(I), by striking "maintains" and inserting "maintained";

(E) in subsection (h)(3)(B)(ii), by striking "association" and inserting "associated".

(9) Section 15B(c)(4) (15 U.S.C. 78o-4(c)(4)) is amended by striking "convicted by any offense" and inserting "convicted of any offense".

(10) Section 15C(f)(5) (15 U.S.C. 78o-5(f)(5)) is amended by striking "any person or class or persons" and inserting "any person or class of persons".

(11) Section 19(c)(5) (15 U.S.C. 78s(c)(5)) is amended by moving the margin 2 em spaces to the right.

(12) Section 20 (15 U.S.C. 78t) is amended by redesignating subsection (f) as subsection (e).

(13) Section 21D (15 U.S.C. 78u-4) is amended –

(A) in subsection (g)(2)(B)(i), by striking "paragraph (1)" and inserting "subparagraph (A)".

(B) by redesignating subsection (g) as subsection (f); and

(14) Section 31(a) (15 U.S.C. 78ee(a)) is amended by striking "this subsection" and inserting "this section".

(c) INVESTMENT COMPANY ACT OF 1940.—The Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) is amended as follows:

(1) Section 2(a)(8) (15 U.S.C. 80a-2(a)(8)) is amended by striking "Unitde" and inserting "United".

(2) Section 3(b) (15 U.S.C. 80a-3(b)) is amended by striking "paragraph (3) of subsection (a)" and inserting "paragraph (1)(C) of subsection (a)".

(3) Section 12(d)(1)(G)(i)(III)(bb) (15 U.S.C. 80a-12(d)(1)(G)(i)(III)(bb)) is amended by striking "the acquired fund" and inserting "the acquired company".

(4) Section 18(e)(2) (15 U.S.C. 80a-18(e)(2)) is amended by striking "subsection (e)(2)" and inserting "paragraph (1) of this subsection".

(5) Section 30 (15 U.S.C. 80a-29) is amended —

(A) by inserting "and" after the semicolon at the end of subsection (b)(1);

(B) in subsection (e), by striking "semi-annually" and inserting "semiannually"; and

(C) by redesignating subsections (g) and (h), as added by section 508(g) of the National Securities Markets Improvement Act of 1996, as subsections (i) and (j), respectively.

(6) Section 31(f) (15 U.S.C. 80a-30(f)) is amended by striking "subsection (c)" and inserting "subsection (e)".

(d) INVESTMENT ADVISERS ACT OF 1940.—The Investment Advisers Act of 1940 (15 U.S.C. 80b et seq.) is amended as follows:

(1) Section 203(e)(8)(B) (15 U.S.C. 80b-3(e)(8)(B)) is amended by inserting "or" after the semicolon.

(2) Section 222(b)(2) (15 U.S.C. 80b-18a(b)(2)) is amended by striking "principle" and inserting "principal".

(e) TRUST INDENTURE ACT OF 1939.—The Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.) is amended as follows:

(1) Section 303 (15 U.S.C. 77ccc) is amended by striking "section 2" each place it appears in paragraphs (2) and (3) and inserting "section 2(a)".

(2) Section 304(a)(4)(A) (15 U.S.C. 77ddd(a)(4)(A)) is amended by striking "(14) of subsection" and inserting "(13) of section".

(3) Section 313(a) (15 U.S.C. 77mmm(a)) is amended —

(A) by inserting "any change to" after the paragraph designation at the beginning of paragraph (4); and

(B) by striking "any change to" in paragraph (6).

(4) Section 319(b) (15 U.S.C. 77sss(b)) is amended by striking "the Federal Register Act" and inserting "chapter 15 of title 44, United States Code,".

SEC. 302. EXEMPTION OF SECURITIES ISSUED IN CONNECTION WITH CERTAIN STATE HEARINGS.

Section 18(b)(4)(C) of the Securities Act of 1933 (15 U.S.C. 77r(b)(4)(C)) is amended by striking "paragraph (4) or (11)" and inserting "paragraph (4), (10), or (11)".

Approved November 3, 1998.

APPENDIX E

15 U.S.C. § 77p – Additional remedies; limitation on remedies

(a) Remedies additional

Except as provided in subsection (b) of this section, the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity.

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) of this section, shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b) of this section.

(d) Preservation of certain actions

(1) Actions under State law of State of incorporation

(A) Actions preserved

Notwithstanding subsection (b) or (c) of this section, a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions

A covered class action is described in this subparagraph if it involves –

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that –

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions

(A) In general

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political

subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) "State pension plan" defined

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding subsection (b) or (c) of this section, a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions

In an action that has been removed from a State court pursuant to subsection (c) of this section, if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action

(A) In general

The term "covered class action" means –

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

(I) damages are sought on behalf of more than 50 persons; and

(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions

Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title.

APPENDIX F

15 U.S.C. § 1441 — Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the

place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

APPENDIX G

[*The Wall Street Journal*, July 17, 2001, at p. C23]

Prudential Limits Brokers' B-Share Sales

FUND
TRACK

By AARON LUCCHETTI

Staff Reporter of THE WALL STREET JOURNAL

In a move likely to highlight the dilemma of which mutual-fund share classés are appropriate for different investors, Prudential Securities Inc. has instructed its brokers to limit sales of "B-share" mutual funds to clients investing $100,000 or less in a single fund. The decision, which took effect this month, follows regulatory scrutiny of brokers who steered wealthy clients to B-share mutual funds when other share classes would have offered cost savings. The policy at Prudential, a unit of Prudential Insurance Co. of America in Newark, N.J., affects its 6,500 brokers as well as insurance agents who sell mutual funds at a separate Prudential subsidiary.

"In most cases, we found that it's better for the client economically," to buy A-class shares when investing more than $100,000, Prudential spokeswoman Susan Atran said. Before this month, managers at Prudential branch offices decided on their own which share class to sell to investors. Now, while branch offices may still sell B shares to wealthier mutual-fund clients, they will have to show the "transaction is economically in the best interest of the client," Ms. Atran said.

Mutual-fund share classes are essentially different pricing packages for entry into a fund, With so-called A

shares, investors pay an up front charge - usually 3% to 6% of assets. When buying B shares, investors usually pay a charge upon exiting the fund, as well as a higher annual fee. The issue has grown in importance as a higher percentage of mutual funds are bought through advisers and brokers who charge some kind of commission in addition to the fund's annual management fee.

For most mutual-fund investors, deciding between A shares and B shares is a difficult decision that has to do in part with how long they plan to hold the fund. Giving up money at the start is painful for many, but a higher annual fee can hurt performance during the long run. "I don't think there's a simple answer on the face of it," said Geoffrey Bobroff, a fund consultant in East Greenwich, R.I. "It really turns on your belief as to where the markets are going."

With wealthier clients, however, mutual funds often reduce or waive the upfront sales charge on A shares, making them a lower-cost alternative to B shares. In April, the National Association of Securities Dealers' regulatory arm levied a fine on St. Louis brokerage firm Stifel, Nicolaus & Co., alleging that one of its brokers erroneously advised customers to buy 13 shares instead of A shares. Without admitting or denying the allegations, Stifel agreed to ex-change the customers' Class B shares for Class A at no charge.

While some mutual-fund companies limit the amount allowed to flow into B shares, often at $250,000, Prudential is among the first in the brokerage industry to add its own rules. "It's another layer of supervision," said Prudential's Ms. Atran.

Merrill Lynch, the nation's largest brokerage firm in terms of registered representatives, hasn't put a dollar restriction on B shares. But a spokesman said yesterday that the New York company "continues to take suitability issues very seriously. They're a prime concern in terms of the distribution of different classes of mutual funds shares." He

added that brokers are trained and educated about which mutual-fund shares are appropriate to sell to different clients in different situations.

For investors who buy and sell their funds rapidly, a third share class, often called C shares, makes sense because they usually don't charge a commission on either the purchase or sale of the fund. But these "level load" funds often have higher continuing, annual expenses, which makes them a worse deal for buy-and-hold investors. Proponents of A shares say they are a good idea for long-term investors since they usually have the lowest annual expenses, but B shares often convert to A shares after they are held by the investor for several years.

APPENDIX H

[*The New York Times*, March 12, 2003, at p. C17]

Most Fund Brokers in Study Failed to Give Full Discounts

By FLOYD NORRIS

An examination of 43 brokerage firms found that all but 2 had overcharged at least some customers who were eligible for discounts on the purchases of mutual funds, regulators said yesterday. Over all, almost a third of customers who were eligible were overcharged.

The regulators said that some disciplinary actions were possible but added that in many cases the problems appeared to have stemmed from inadequate procedures at brokerage firms rather than an intent to overcharge customers.

"Over all, we thought it was more sloppiness than intentional," said Lori Richards, the director of the Securities and Exchange Commission's office of compliance inspections and examinations.

The discounts related to the sale of mutual funds that charge sales commissions, known in the fund industry as loads.

Most load funds offer lower commissions to investors who exceed certain "break points" by investing more money in their funds.

Different fund families have different break points and different policies on other issues, including what family accounts can be consolidated for purposes of calculating them and whether investors can get a lower rate by signing a letter of intent, promising to invest a certain amount in a group of funds over the next year or 13 months.

The inquiry by the S.E.C., NASD and the New York Stock Exchange was conducted from November to January

and looked at more than 9,000 mutual fund transactions at the 43 firms. It chose transactions in which miscalculations seemed possible and discovered 5,515 transactions that appeared to be eligible for reduced sales charges. Of those, 1,757 did not receive a discount or received one that was smaller than deserved. That came to 32 percent of the transactions that were eligible.

The discounts not provided ranged from $2 to $10,289 and averaged $364 for each transaction. While two firms provided all the discounts that were required, three others did not provide any of them. The regulators did not identify the firms but said they would be required to refund overcharges. All firms that sell load mutual funds will also be required to review their records.

Mary Schapiro, NASD's vice chairwoman, said errors were far more likely at firms that process orders electronically rather than use paper forms. "This has become an incredibly complex business, with volume discounts and linkages of various accounts, and technology in many firms did not keep up with it," she said.

In some cases, the regulators found instances of investors missing out on commission discounts they might have been eligible for had they received better advice. Some investors bought almost enough shares to receive a discount, raising the question of whether the broker had informed them of the savings available if they had invested a little more. In other cases, customers were sold several similar funds, like several high-yield bond funds, when they would have paid significantly lower commissions had they put the entire investment in one fund.